



# Notre Dame Journal of Law, Ethics & Public Policy

Volume 9

Issue 1 *Symposium on Sexual Orientation*

Article 9

February 2014

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### Recommended Citation

Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 241 (1995).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol9/iss1/9>

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# SEXUALITY INJUSTICE

CHESHIRE CALHOUN\*

## INTRODUCTION

The language of "gay and lesbian rights," following as it does on the heels of the civil and women's rights movements, suggests an affinity, a natural analogy, between the political position of gay men and lesbians on the one hand and of women and racial minorities on the other. Affinities are not hard to find. Gay men and lesbians face a formidable array of discriminatory policies and practices that limit their liberty and opportunity. Legally, gays and lesbians are in much the same position as racial minorities and women prior to the civil rights acts; they are unprotected against informal discrimination and subject to differential treatment under the law.

Any developed analogy between the political position of gay men and lesbians and that of racial minorities and women, however, would have to go substantially beyond attending to formal and informal discriminatory policies. Over the past several decades, feminists and black theorists have developed analyses of gender injustice and racial injustice as matters not merely of inequity, but of oppression.<sup>1</sup> That is, gender and racial injustice are also systematically built into the ways that we, as a society, live and think. Implicated in gender injustice, for instance, are gender socialization, the gender structure of the family, the unpaid and devalued status of domestic-reproductive labor, inferiorizing stereotypes, the conceptual distinction between public and private spheres, the cultural normalization of violence toward women, and the feminization of poverty.<sup>2</sup> To understand gender injustice is to understand the *place* of women in socio-economic structures and practices, the disadvantaging *effects* of occupying that place, and the factors that systematically keep women *in place*.

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1. Marilyn Frye gives a classic definition of oppression: "The experience of oppressed people is that the living of one's life is confined and shaped by forces and barriers which are not accidental or occasional and hence avoidable, but are systematically related to each other in such a way as to catch one between and among them and restrict or penalize motion in any direction." MARILYN FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 4 (1983).

2. See *infra* notes 7-8.

The purpose of this essay is to understand the presumably analogous group-focused injustice to which gay men and lesbians are subject. What content can be given to the idea of a *sexuality injustice* comparable to racial and gender injustice?<sup>3</sup> A central difficulty in developing the notion of sexuality injustice is that lesbians and gay men, unlike women and racial minorities, do not appear to be located in any particular social structural place. The private sphere, urban ghettos, "pink collar" jobs, menial jobs, sex industry workers, the roster of welfare clients, the poverty zone—these are all places disproportionately inhabited by racial minorities and/or women. Gay men and lesbians, by contrast, seem to inhabit no particular place.

This article will argue that sexuality injustice differs substantially in form from gender and racial injustice. In particular, sexuality injustice does not materialize in a disadvantaged *place*. Instead, sexuality injustice consists in the systematic *displacement* of gay men and lesbians to the outside of civil society. As a social group, gay men and lesbians have no legitimized place.

Part I clarifies why one cannot go about investigating sexuality injustice with the same assumptions and methods that have proved so useful in understanding racial and gender injustice. Parts II, III, and IV, using placelessness as the guiding theme, outline some of the central contours of sexuality injustice. Part II examines the way that apparent heterosexual identity is a condition of access to the public sphere. As a result of this condition, gay men and lesbians must adopt a pseudonymous heterosexual identity in order to gain full access to the public sphere. Part III examines the legal, psychiatric, educational, and familial practices which seek to prevent future generations of lesbian and gay people. Part IV examines criminalizing stereotypes of gay and lesbian identity.

## I. THE PROBLEM OF NON-LOCATED SUBJECTS

"We are everywhere," runs a popular gay and lesbian slogan. Designed to challenge the disclaimer "I don't know anyone who is gay or lesbian," the slogan draws attention to two key features of gay and lesbian existence. First, gay men and lesbians do not occupy any specific socio-economic structural position.

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3. I have made up the term "sexuality injustice." I would have preferred the less cumbersome term "sexual injustice," but this has long been used synonymously with "gender injustice." The only other available terms—"homophobia" and "heterosexism"—bear, like "gynophobia" and "sexism," overly strong attitudinal connotations and thus are ill-suited for describing social, structural, and conceptual features.

Although they constitute a social group, this does not translate into a statistical concentration in any particular socio-economic location. Second, it is possible to be unaware that gay men and lesbians are everywhere because the "closet," coupled with the presumption of heterosexuality, allows gay men and lesbians to circumvent the discriminatory practices designed to enable heterosexuals to disclaim knowledge of homosexuals. These are not profound observations, but they have an important implication: theorizing about sexuality injustice cannot be modeled on theorizing about gender and racial injustice. In particular, it cannot employ the same concepts of 'social group' and 'oppression.'

#### A. Marxist, Socialist, and Liberal Approaches to Gender Injustice

Although Marxist, liberal, and socialist feminisms operate from different conceptions of what justice is, they nevertheless share a basic assumption and a common methodology, both of which are critical to their making a case that there is such a thing as gender injustice. The shared assumption is that women constitute a social group, which means two things. First, people fall into one of two groups—those who fit the identity "man" and those who fit the identity "woman." Second, it means that, with rare exceptions, the persons who fit the identity "woman" are readily *identifiable* by others as doing so. Their identity is socially visible. As a result, persons who *are* women will be socially treated *as* women.<sup>4</sup>

Drawing a distinction between being a woman, in the sense of fitting the identity "woman," and being publicly identifiable as a woman should not suggest that "woman" is a natural or essential identity.<sup>5</sup> However, an identity can be a social construct with-

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4. This is not to say that persons who are women will *only* be treated as women. Those persons will also have a race, a class status, an age, and an ethnicity, all of which, insofar as they are publicly visible markers of identity, will determine how they are treated. I also do not mean to suggest that being treated "as a woman" amounts to some one thing. Again, race, class, ethnicity, and age will shape the concrete form that being treated "as a woman" takes. Nor do I mean to suggest that for all persons who are women, gender is the primary determinate of how they are treated. Race and known lesbianism, homosexuality, or bisexuality can have powerful consequences for how persons are treated that are largely independent of gender.

5. For useful overviews of the essentialism-constructivism controversy, see Edward Stein, *Conclusion: The Essentials of Constructionism and the Construction of Essentialism*, in FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 325 (Edward Stein ed., 1990) [hereinafter FORMS OF DESIRE]; Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993).

out it being at all publicly obvious who has that particular identity. The socially constructed identity "criminal" is a case in point. Given a society in which "criminal" is an available identity, there will be persons who *are* criminals—they fit the description—and persons who are not. But criminals can often conceal their "true" identity, forge a counterfeit identity as law-abiding citizens, and thus escape being treated as criminals.<sup>6</sup>

Women, by contrast, cannot usually pass as men. The fact that women cannot evade being identified as women, and thus cannot evade being treated as women, makes it possible to adopt a general methodological strategy to uncovering gender injustice, namely, asking where, as a result of being treated *as* women, persons who *are* women end up being located in the economic, familial, welfare bureaucratic, educational, military, and social institutions and structures. Asking where women are located reveals the fact that women are disproportionately concentrated in "pink collar" jobs, in paid domestic service, in wife-mother roles, and in welfare dependency positions. Gender, then, arguably makes a difference to the lives of women that it ought not to make.

Marxist and socialist feminism, for example, rely heavily on the fact that persons who are women and persons who are men occupy different locations in a gender-structured labor system.<sup>7</sup> In particular, women do both unpaid sexual-reproductive-domestic labor and (under)paid productive labor that exploits their womanly capacities and characteristics. Analyses of women's labor reveals the difference gender makes to one's vulnerability to exploitation, impoverishment, and commodification (for example, of one's sex-affective capacities), all of which are, from a Marxist viewpoint, characteristics of unjust social systems. The

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6. The term "counterfeit identity" is taken from JAMES D. WOODS & JAY H. LUCAS, *THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA* 75-76 (1993). Woods uses this term for gay men who actively manage their public identity in order to pass as heterosexual.

7. See, e.g., CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM (Zillah Eisenstein ed., 1979); NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 173-190 (1978); SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970); NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY* 144-160 (1989); ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983); Ann Ferguson, *On Conceiving Motherhood and Sexuality: A Feminist Materialist Approach*, in *MOTHERING: ESSAYS IN FEMINIST THEORY* 153 (Joyce Trebilcot ed., 1983); Heidi I. Hartmann, *The Unhappy Marriage of Marxism and Feminism: Toward a More Progressive Union*, in *FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN* 172 (Alison M. Jaggar & Paula S. Rothenberg eds., 2d ed., 1984).

Marxist-socialist case for gender injustice thus uses a "place and numbers" approach: there are identifiable places in the division of labor which large numbers of women disproportionately occupy, and which thus are reasonably regarded as "women's places." Those women's places can be critiqued from a Marxist-socialist viewpoint as wrongful or wrong-imposing places.

Liberal feminism similarly employs a "place and numbers" approach. Liberal feminism relies heavily on the fact that women and men occupy different locations in a gendered opportunity structure.<sup>8</sup> In particular, women confront formal, informal, and structural barriers (for example, the gendered structure of the family) to securing social goods that men do not face.<sup>9</sup> Analyses of those barriers reveal the difference gender makes to one's opportunity for educational and economic attainment, physical security, independence from patriarchal or welfare bureaucratic authority, and the like. The liberal case for gender injustice thus depends on a "place and numbers" approach: there are identifiable places in the opportunity structure which large numbers of women disproportionately occupy, and which thus are reasonably regarded as "women's places." Those women's places can be critiqued from a liberal viewpoint as wrongful regardless of who occupies them or as unfairly distributing social goods and opportunities on the irrelevant basis of gender, or both.<sup>10</sup>

### B. *The Problem With A "Place and Numbers" Analysis of Sexuality Injustice*

A "place and numbers" approach is not similarly useful for analyzing sexuality injustice, because gay men and lesbians do not constitute a social group in the same sense that women do.

First, persons arguably do not *have* a sexual identity in the same way that they have a gender identity. There may be so

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8. See, e.g., ZILLAH R. EISENSTEIN, *THE RADICAL FUTURE OF LIBERAL FEMINISM* (1981); BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963); SYLVIA A. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* (1986); JAGGAR, *supra* note 7; SUSAN M. OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989); RUTH SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* (1986) *SEX EQUALITY* (Jane English ed., 1977); *WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB* (Barbara F. Reskin & Heidi I. Hartmann eds., 1986).

9. See *supra* note 8.

10. See, e.g., OKIN, *supra* note 8. Okin's book exemplifies the liberal approach to gender injustice. For her, the wife-mothering place in the family is in itself a wrongfully disadvantaging place. In addition, because women are the ones typically occupying that place, the wife-mother role unfairly limits *women's* opportunities.

much slippage and overlap between 'heterosexual' and 'homosexual' that no clean distinction between the two groups is possible.<sup>11</sup> Second, even supposing two clearly distinct sorts of persons, homosexuals are not readily identifiable from heterosexuals. The social presumption that persons are heterosexual unless there is clear evidence to the contrary helps to conceal gay men and lesbians. And, like criminal identity, sexual identity can be deliberately concealed. As a result, persons who *are* lesbian or gay evade being socially treated *as* lesbian or gay persons. Instead, they are treated as members of the social group "heterosexuals." That latter group, as legal theorist Janet Halley has argued, is in fact a default group composed of persons who are heterosexual and persons who are not but whose deviance is not publicly identifiable.<sup>12</sup>

In the absence of large numbers of obviously gay or lesbian persons, there is little point to creating "gay places" or "lesbian places" in the socio-economic structure where those identified as gay or lesbian can be treated as homosexuals. Even were there such places, gay men and lesbians would not be located primarily in those places. Through the presumption of heterosexuality and the active closeting of lesbian or gay identity, lesbians and gay men move into heterosexual places in employment, the military, and the family.<sup>13</sup> As a result, the "place and numbers" approach that proved useful in revealing gender injustice fails to reveal an analogous sexuality injustice.

Consider, for example, how the invisibility of gay men and lesbians handicaps a Marxist or socialist analysis. Persons who are gay or lesbian do not do any distinctive kind of labor. There is no "lesbian work" comparable to "women's work," and only a few occupations (e.g., hairdresser or clothes designer) are stereotyped as "gay jobs." One might, of course, argue that being outside the labor system, and thus economically marginalized, is itself a place to which gays and lesbians are assigned. It is true that those identified as gay or lesbian may well be denied or fired

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11. See, e.g., EVE K. SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 182-212 (1990); Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13 (Diana Fuss ed., 1991); Janet E. Halley, *The Construction of Heterosexuality*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 82 (Michael Warner ed., 1993) [hereinafter *FEAR OF A QUEER PLANET*].

12. Halley, *supra* note 11, at 85-86.

13. By "moving into the family" I have a number of things in mind. Gays and lesbians can avoid being expelled from their native family by closeting their homosexuality or lesbianism; they can be heterosexually married, creating conventional families of their own; and they can create gay and lesbian families, protecting those families from intervention by closeting them.

from jobs in the paid workforce and prevented from participating in the creation, care and education of children. The attempt to remove or exclude gay men and lesbians completely from paid productive labor and the labor of reproducing the next generation is important in understanding sexuality injustice.<sup>14</sup> However, unlike social groups whose members are readily identifiable, gays and lesbians evade statistical concentration in their assigned place. Thus, sexual orientation does not make the kind of difference to one's material conditions that, by contrast, gender does.

Lesbian and gay invisibility similarly handicaps traditional liberal analyses. Neither formal law nor informal discriminatory policies and practices have the necessary consequence of systematically preventing persons who are gay or lesbian from exercising their liberties or having access to opportunities. Consider, for example, the substantially different impact of the military policy barring women from combat and its policy of barring gay men and lesbians from military service. The former effectively bars women from combat. The latter does not effectively bar persons who are gay or lesbian from service; it only bars the identifiably gay or lesbian. So long as they pass as heterosexual, gay men and lesbians will occupy virtually the same location in the opportunity structure as heterosexuals. Once again, sexuality injustice does not materialize.

Organizations on the religious right, such as Lou Sheldon's Traditional Values Coalition, have capitalized on this fact (with help from the gay rights movement itself, which has found it strategically useful to underscore gay and lesbian economic clout). As part of their argument against ascribing suspect classification to lesbians and gay men, they have pointed to the dissimilarity between the material conditions of racial minorities on the one hand and of gay men and lesbians on the other.<sup>15</sup> Arguments assuming that a social group could not be a target of systematic injustice if that group enjoys a reasonable level of material well-being employ precisely the conception of group-focused injustice that feminists and race theorists have relied on: group-focused injustice occurs when large numbers of a particular social group

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14. See, e.g., IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 53-55 (1990). Young argues that marginalization—having one's labor refused because of one's group membership—is one face that oppression takes.

15. The video "Gay Rights, Special Rights," produced by the Traditional Values Coalition, takes just this tack. According to the spokesperson for TVC, 30,000 copies were distributed between July and December of 1993, 500 to members of Congress and the rest to church groups, civic associations, reporters, and local PTA's. *VILLAGE VOICE*, Dec. 14, 1993, at 23.



are disproportionately clustered in opportunity-limiting and highly exploitable places. Because this is not true of gays and lesbians, the religious right, echoing Justice White in the *Bowers v. Hardwick*<sup>16</sup> decision, has tended to find gay and lesbian minority-rights claims to be facetious claims for special rights.<sup>17</sup> Leftist counter-arguments that point to the systematic disadvantaging of those *publicly identified* as gay or lesbian miss the mark, since the disadvantaged situation is not necessarily representative of gays and lesbians as a group. Some gay men and lesbians protect themselves against being disadvantaged by concealing their lesbian or gay identity and adopting a pseudonymous heterosexual identity. Others, who do not deliberately try to pass as straight, are nevertheless routinely treated as heterosexuals, since the social presumption is that persons are heterosexual unless proven otherwise.

Locked into a conception of group-focused injustice whose measure is access to socio-economic goods, both the right and the left ignore the closet. The right underscores the absence of high numbers of gay men and lesbians who have been disadvantaged, ignoring the compulsory closeting and presumption of heterosexuality that makes liberty and access to opportunity possible. The left underscores the deprivations of liberty and opportunity suffered by those identified as gay or lesbian, ignoring the way the closet and the presumption of heterosexuality protects gays and lesbians as a group from suffering those consequences.

In what follows, a different methodological approach will be taken to understanding sexuality injustice. Rather than focusing on the *disadvantaging* effects of being treated as a lesbian or gay man, this article focuses on the displacement of homosexuality and lesbianism to the outside of civil society. In particular, it will examine (1) the production of a heterosexual society through the requirement that all citizens either really have a heterosexual identity or adopt a pseudonymous one as a condition of access to the public sphere; (2) the reproduction of heterosexual society through legal, psychiatric, educational, and familial practices whose aim is to prevent future generations of lesbian and gay people; and (3) the legitimation of heterosexual society through the construction of criminalizing stereotypes of gay and lesbian identity that undermine the claim of gays and lesbians to full civic status.

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16. 478 U.S. 186 (1986).

17. Justice White argued that against a background in which many States have criminalized sodomy and still do, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.* at 194.

## II. HETEROSEXUAL IDENTITY AS A CONDITION OF ACCESS TO THE PUBLIC SPHERE

Sodomy has a long, distinctive history as the unmentionable crime. Prior to the secularization of sodomy prohibitions in the 1500s, "sodomy had been defined in strictly ecclesiastical terms as one of the gravest sins against divine law whose name alone proved such an affront to God that it was often named only as the unnamable": *inter Christianos non nominandum*.<sup>18</sup> Throughout the 1600's, sodomy continued to be referred to within British law as the crime that among Christians is not to be mentioned, and a century later, Blackstone uses this same (non)description in his *Commentaries on the Laws of England*, remarking,

I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named: "*peccatum illud horribile, inter Christianos non nominandum*."<sup>19</sup>

Even after the removal of sodomy from the roster of capital crimes in 1861 and its reincorporation in 1885 under a British statute prohibiting "gross indecency" between men, sodomy continued to be publicly regarded as the unspeakable crime—this time not because of its grave sinfulness but because of its grave violation of standards of decency.<sup>20</sup> In the United States, some state statutes still refuse to name what they prohibit, instead referring with vague decency to "crimes against nature."<sup>21</sup> In his concurring opinion in *Hardwick*, Justice Burger recalled the words of Blackstone, pronouncing sodomy "a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'"<sup>22</sup>

The history of laws prohibiting sodomy and acts of gross indecency between men is simultaneously a history of the linguistic taboo on publicly naming and describing both a specific sex act (sodomy) and an amorphous class of same-sex interactions

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18. Ed Cohen, *Legislating the Norm: From Sodomy to Gross Indecency*, in *DISPLACING HOMOPHOBIA: GAY MALE PERSPECTIVES IN LITERATURE AND CULTURE* 169, 173 (Ronald R. Butters et al. eds., 1989) [hereinafter *DISPLACING HOMOPHOBIA*].

19. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*215.

20. Cohen, *supra* note 18, at 188.

21. See, e.g., MASS. ANN. LAWS ch. 272, § 34 (Law Co-op. 1992); MISS. CODE ANN. § 97-29-59 (1994).

22. *Hardwick*, 478 U.S. at 194.

("gross indecency" or "homosexual conduct"). Thus, this history is one of laws that not only render privately performed sex a matter of public concern, but *also* privatize public acts of linguistic representation. That dual history ultimately has the dual effect of undercutting the claim of gay men and lesbians to have a private sphere where their sexual, affiliational, and familial relations are protected from public intrusion *and* of denying them any entitlement to represent themselves in the public sphere as lesbians and gay men. It is, in brief, a history of denying to gay men and lesbians both a private sphere and a public sphere. Sections A, B and C below focus on the removal of homosexuality and lesbianism from the public sphere, and their linguistic seclusion as the "love that dare not speak its name."

A. *The Privatization of Sexual Identity in Bowers v. Hardwick*

In an insightful assessment of the majority and minority opinions in *Hardwick*, Robert L. Caserio observes:

[W]hat is unsettling is that both sides cannot permit to homosexuals a space of appearance in the public realm. While the Court majority justifies supervising—and even eliminating—homosexual privacy, and while the Court minority defends homosexual privacy, both sides agree that homosexuality is only a private matter. This exclusive identification of homosexuality with privacy guarantees that the judges, at their worst, will equate homosexuality with . . . sodomitical sexual intimacies . . . and at their best, with emotional intimacies relevant only to the private sphere. Hence for both sides, homosexuality has no public, no *political*, existence . . . . So the arguments of both sides of the Court maintain a long ideological tradition: that homosexual life, whether supervised or not, is and should be a closeted life.<sup>23</sup>

What Caserio draws attention to here is the double meaning of "private." "Private" refers ambiguously to (a) what is done in the private sphere behind closed doors, away from public view, and often away from public knowledge, and (b) what is beyond the reach of legitimate governmental control whether done behind closed doors or not. Although disagreeing over whether sodomy is private with respect to legal regulation, both the majority and dissenting opinions in *Hardwick* agree that homosexuality (and not just sodomy) is an inherently private, behind-closed-doors practice. Both equate homosexuality with sexual activity, and in

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23. Robert L. Caserio, *Supreme Court Discourse vs. Homosexual Fiction*, in *DISPLACING HOMOPHOBIA*, *supra* note 18, at 255, 261-62.

particular, with sexual activity that is completely disconnected from life in the public sphere. Neither contextualizes homosexual sodomy within the broad set of acts by which one might enact a sexual identity, where that set includes not only private sex acts but also public choices of domestic partner, co-parent, political group affiliations, dress, styles of interaction with others of the same and opposite sex, and self-representation as the bearer of a particular sexual identity.<sup>24</sup> As a result, the connection between the demand to be let alone to conduct one's sex life as a homosexual and the demand to be let alone to enter the public sphere as a homosexual cannot be made.

In the majority opinion, the privatization of homosexuality occurs through the rhetorical strategy of equating homosexuality with sodomy. Justice White's majority opinion and Justice Burger's concurring opinion repeatedly substitute the terms "homosexual conduct," "homosexual activity," "homosexual practices," and "homosexuality" for the term "homosexual sodomy."<sup>25</sup> "Homosexual conduct," "homosexual activities," "homosexual practices" and "homosexuality" are not, in fact, equivalent expressions for "homosexual sodomy." "Homosexual conduct, activities, or practices" refers broadly to any activity that seems to presuppose homosexual desires or a gay or lesbian identity. The military, for example, classifies the attempt to marry someone of the same sex as homosexual conduct.<sup>26</sup> Sam Nunn has declared that avowing one's homosexuality is itself homosexual conduct.<sup>27</sup> One central effect of rhetorically substituting "homosexual conduct" for "homosexual sodomy" is to suggest that homosexual conduct and homosexual sodomy are one and the same thing.<sup>28</sup> Enacting a homosexual identity in one's conduct and practices is thus reduced to nothing but performing acts of sodomy. Reduced to mere sex (indeed to a single kind of sex act), homosexuality appears utterly out of place in and irrelevant to the pub-

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24. Justice White implicitly does contextualize heterosexual sex acts within a broad set of acts by which heterosexual identity might be enacted. It is, in his view, specifically homosexual activity that has no connection with marriage, the family, and procreation. Heterosexual sexual activity, one is left to assume, does have this connection to more public marital and familial statuses.

25. *Hardwick*, 478 U.S. at 186, 189, 191, 195-96.

26. 32 C.F.R. § 41, App. A, Pt. 1, H.1.c(2) (1993).

27. Pat Towell, *Nunn Offers a Compromise: "Don't Ask/Don't Tell,"* CONG. Q. WEEKLY REP., May 15, 1993, at 1240.

28. For an interesting discussion of the confusion of act and identity in White's majority opinion see Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

lic sphere, including work, social interaction, education, the media, and the military.

Moreover, reduced to mere sex, "homosexual conduct" ceases to include gay and lesbian marriages, parenting, and procreative choices. Thus, *homosexual* sodomy not only has no connection to *heterosexual* family, marriage, or procreation, it has, for Justice White, no connection to *homosexual* families, marriages, or procreative choices, since these are not recognized as possible forms of homosexual conduct. Marriage, the family, and procreation are, however, very much part of the public sphere. Their public aspects include public celebrations of marriages, anniversaries, and births, baby showers, maternity leave policies, spousal health benefits, family-oriented public entertainment, public aid to families with dependent children, tax breaks for married persons, joint invitations to couples, entitlement to give proxy consent, family planning clinics, artificial insemination services, and adoption services. Claiming "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other,"<sup>29</sup> therefore, further displaces homosexuality from the public sphere.

Justice Blackmun, though disagreeing that the state may legitimately regulate sodomy, did not challenge the assumption that homosexuality concerns only a person's private, intimate life behind closed doors. The broad "right to be let alone" that he identifies at the outset of his dissent, turns out to be, when applied to homosexual sodomy, a much narrower right to be let alone with respect to intimate, "intensely private," physical, sexual associations that take place within one's own home.<sup>30</sup> Because Blackmun, like Justice White, equates homosexuality with mere sex, he contextualizes homosexual sodomy with other (private) sex acts—heterosexual activity between unmarried persons, heterosexual sodomy between married persons,<sup>31</sup> and the (private) viewing of obscene materials.<sup>32</sup> He does not contextualize sodomy among potentially public ways of enacting an identity, way of life, or, in his words, "self-definition."<sup>33</sup>

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29. *Hardwick*, 478 U.S. at 191.

30. *Id.* at 199, 213.

31. *Id.* at 210, n.4.

32. The analogy between *Hardwick* and *Stanley v. Georgia*, 394 U.S. 557 (1969), which concerned private consumption of pornography in one's own home, is central to Justice Blackmun's argument.

33. *Hardwick*, 478 U.S. at 205. That is, instead of relying on *Stanley*, he might have relied more heavily on *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which protected individuals' right to be let alone to choose "a way of life that [may be] odd or even erratic but interferes with no . . . interests of others." *Id.*

In sum, both opinions privatize homosexuality by misdescribing homosexuality as a matter of mere sexual intimacies. As a result, the unmentionability of lesbian and gay identity in the public sphere is made to seem natural and normal. In other words, the Court's rhetoric served to legitimize what is arguably the central feature of sexuality injustice, namely the reservation of the public sphere for heterosexuals only. This is not to say that securing a right of privacy with respect to gay and lesbian sexual activities is unimportant. It is, however, to say that the rhetoric of privacy arguments can do as much to sustain sexuality injustice as to intervene in it.

B. *The Double Standard for Heterosexual v. Homosexual Self-Representation*

Heterosexuals move about in the public sphere as heterosexuals, and that identity is by no means a private matter. Public social interaction and the structure of public institutions are pervaded with the assumption that public actors are heterosexual and with opportunities for people to represent themselves as such. Humor, formal and informal dress codes, corporate benefits policies, "scripts" for everyday conversation about personal life, public display of family pictures, and so on presuppose that public persons *are* heterosexual. They also enable individuals to publicly represent themselves *as* heterosexuals.<sup>34</sup> Unlike "the love that dare not speak its name," heterosexuality is the love whose name is continually spoken in the everyday routines and institutions of public social life.

This double standard for heterosexual as opposed to homosexual self-representation is based on the assumption that heterosexuality is and ought to be constitutive of what it means to be a public actor and citizen. The equation of "public actor" with "heterosexual actor" is in part sustained by regarding homosexual identity as a private, behind-closed-doors matter, as White and Blackmun did. It is also sustained by requiring that gay men and lesbians adopt a pseudonymous heterosexual identity as a condition of access to the public sphere, and by instituting a set of discriminatory practices and policies that penalize individuals for publicly representing themselves as gay or lesbian.

Because gay and lesbian self-representations, not the persons themselves, are removed from the public sphere, gay and

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at 224. In *Yoder*, the Court upheld the right of Amish citizens to decide against extended formal schooling for their children.

34. See Woods & Lucas, *supra* note 6. Woods and Lucas generally give a thorough account of the heterosexualization of corporate life.

lesbian exclusion from the public sphere is disanalogous to the exclusion of women and racial minorities. Historically, the public sphere has been the privileged domain of men and whites. That privilege was (is) maintained by laws, policies, and practices limiting women's and racial minorities' access to the public sphere, and by penalizing overly public women and racial minorities (for example, through rape and lynching<sup>35</sup>). Significantly, making the public sphere the privileged domain of men and whites requires discriminating on the basis of status—i.e., discriminating against persons who *are* women, and persons who *are* racial minorities. By contrast, making the public sphere the privileged domain of heterosexuals does not. The presence of persons who are gay or lesbian need not "contaminate" the heteronormativity of public space so long as homosexuality and lesbianism, as identities, remain private matters, and so long as, in public, gay men and lesbians adopt pseudonymous heterosexual identities.

This disanalogy is significant. Although gender and racial justice, in the form of equal access to the public sphere, can reasonably be pursued through policies prohibiting discrimination on the basis of status, sexuality justice cannot. Status-based policies which affirm that public actors may *be* lesbian or gay fail to address the basic mechanism by which gay men and lesbians have been denied equal access to the public sphere, namely, the effective denial through laws, policies, and public practices that public actors may *represent* themselves as lesbians or gay men.

### C. *The Lacuna in Status-Based Anti-Discrimination Policies*

The distinction between status and conduct is not clearly and explicitly presupposed by policies prohibiting discrimination on the basis of race or sex status. On the contrary, restricting distinctively raced or gendered conduct seems *prima facie* to be a form of race or sex status-discrimination. Nor has the distinction

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35. "Women have been raped by men, most often by gangs of men, for many of the same reasons that blacks were lynched by gangs of whites: as a group punishment for being uppity, for getting out of line, for failing to recognize 'one's place,' for assuming sexual freedoms . . . ." SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 28 (1976).

"Laws were formulated primarily to exclude black men from adult male prerogatives in the public sphere, and lynching meshed with these legal mechanisms of exclusion." Jacquelyn Dowd Hall, *The Mind that Burns in Each Body: Women, Rape, and Racial Violence*, in *RACE, CLASS, AND GENDER* 400 (Margaret L. Andersen et al. eds., 1992). Hall notes that lynching increased following Reconstruction, and rapes increased during the anti-feminist backlash. These occurrences suggest a correlation between lynching and rape on the one hand, and increased public activity on the other.

between *having* a particular status and making one's status *known* to others been presupposed by sex and race anti-discrimination policies. On the contrary, one obvious effect of anti-discrimination policies is an increase in the number of persons who are visibly racial minorities and/or women.

Both the status-conduct and the "having"-*"making known"* distinctions have, by contrast, been central to policies that supposedly do not discriminate on the basis of sexuality status. For example, military policy concerning gay and lesbian service members has in the past implicitly invoked,<sup>36</sup> and now explicitly invokes, a distinction between status and conduct. That distinction is supposedly critical to framing a policy that does not discriminate on the basis of who one *is* yet still grants the military authority to regulate what its members *do*. In reality, the distinction is critical to keeping the military's public heterosexual.

Military policy prior to 1994 prohibited not only sexual activity between persons of the same sex, but also making one's homosexuality known.<sup>37</sup> Publicly stating "I am a lesbian" was no less an offense warranting discharge than private lesbian sexual acts. In recent discussion of the proposed new policy, revealingly dubbed "don't ask, don't tell," the Senate Armed Services Committee chairman, Sam Nunn, affirmed that avowing one's homosexuality or lesbianism *is* conduct and ought to be prohibited.<sup>38</sup> Although the policy that actually went into effect in 1994 does not make self-identifying statements automatic grounds for dismissal, it does make them grounds for starting an investigation, "and once such an investigation is started, the service member would have to prove that he had not engaged in homosexual acts."<sup>39</sup> In controlling public identity, not just sexual acts, both old and new policies require that the persons who are to be exempted from status-discrimination adopt a pseudonymous heterosexual identity.<sup>40</sup>

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36. The Army at least *claimed* in *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989), that it discriminated only on the basis of conduct not status. Judge Norris argued that Army policy could not reasonably be interpreted as drawing a conduct-status distinction. (See *infra* text accompanying notes 103-105).

37. One of the bases for separation was the fact that "[t]he member has stated that he or she is a homosexual or bisexual . . ." 32 C.F.R. § 41, App. A, Pt. 1, H.1.c(2) (1993).

38. See *supra* text accompanying note 27.

39. Michael R. Gordon, *Pentagon Spells Out Rules for Ousting Homosexuals; Rights Groups Vow a Fight*, N.Y. TIMES, Dec. 23, 1993, at A14.

40. Revealingly, General Norman Schwarzkopf testified that "homosexuals have served in the past and done a great job serving their country, and I feel they can in the future" but "it's *open* homosexuality in a unit



Courts have also invoked the status-conduct distinction to the same end of controlling public identity. In *Norton v. Macy*,<sup>41</sup> the D.C. Circuit Court denied that sexual orientation was rationally related to the efficiency of the civil service. Norton, a budget analyst, was discharged from the National Aeronautics and Space Administration for immoral conduct and for "possessing personality traits which render[ed] him 'unsuitable for further Government employment' "<sup>42</sup> after confessing, in what even the court deemed a dubiously legal police interrogation, to previous homosexual experiences.<sup>43</sup> The court ruled that employees could not be dismissed simply for being gay or lesbian. Some particularized and substantiated evidence of a connection between the employee's homosexuality and the efficiency of the service needed to be shown. But the court also emphasized that the plaintiff was "an extremely infrequent offender, who neither openly flaunts nor carelessly displays his unorthodox sexual conduct in public,"<sup>44</sup> implying that he might reasonably have been dismissed for refusing to appear heterosexual in public space.

In a subsequent case, *Singer v. United States Civil Service Commission*,<sup>45</sup> the court came to just that conclusion. John F. Singer, a clerk typist for the Seattle Office of the Equal Employment Opportunity Commission, was fired by the Civil Service Commission for "flaunting" and "broadcasting" his homosexuality and for receiving "wide-spread publicity in this respect in at least two states."<sup>46</sup> The Commission noted that Singer had kissed a male in front of the building elevator and in the company cafeteria, had applied with another man for a marriage license, had "homosexual advertisements" on the windows of his car, was on the Board of Directors of the Seattle Gay Alliance, showed by his "dress and demeanor" that he intended to continue his homo-

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that causes this breakdown in unit cohesion." Anne B. Goldstein, *Reasoning about Homosexuality: A Commentary on Janet Halley's "Reasoning about Sodomy: Act and Identity In and After Bowers v. Hardwick"*, 79 VA. L. REV. 1781, 1803 n.115 (1993) (emphasis added) (quoting Norman Schwarzkopf).

41. 417 F.2d 1161 (D.C. Cir. 1969).

42. *Id.* at 1162.

43. Clifford Norton was picked up by a Morals Squad after he picked up a man, drove him once around Lafayette Square and dropped him off again. The Morals Squad interrogated Norton for two hours, and a NASA security chief interrogated him for an additional three hours, before Norton finally conceded that he had some prior homosexual experiences. However, he denied that he was homosexual and denied that on this night he had done anything more than invite the man he picked up in for a drink. *Id.* at 1162-63.

44. *Id.* at 1167.

45. 530 F.2d 247 (9th Cir. 1976).

46. *Id.* at 250 n.3 (quoting Civil Service Commission letter to Singer).

sexual activity, and had received television, newspaper, radio, and magazine publicity.<sup>47</sup> Denying that Singer was discharged because of his status, the Commission argued that Singer's "repeated flaunting and advocacy of a controversial lifestyle"<sup>48</sup> would undermine public confidence in, and thus the efficiency of, the Civil Service. The court agreed. Noting that "[t]he problem is to arrive at the proper balance between the interests of the employee, as a citizen, and the interest of the Government, as an employer,"<sup>49</sup> the court proceeded to stress that what distinguished *Singer* from *Norton* was that Singer had not, as Norton had, kept his homosexuality private.<sup>50</sup> In publicly occupying a discredited identity, Singer brought discredit on his employer. In sum, status-based nondiscrimination policies like these fail to remedy sexuality injustice precisely because they affirm, rather than contest, the reasonableness of treating gay and lesbian identities as discreditable and discrediting, and as identities which *citizens* can have no strong interest in publicizing (a point elaborated on in Part IV).

Briefly considering what the gender analog to status-conduct distinguishing policies would look like brings the problem into sharper focus. Imagine, for example, a military service policy that, while claiming not to discriminate against persons who *are* women, proceeded to ban all "conduct" that made women publicly identifiable *as* women. Women would be subject to discharge both for engaging in womanly activities (say, joining the National Organization for Women or wearing women's clothing) and for making the self-identifying statement "I am a woman." Avowing their womanhood and/or flaunting or carelessly displaying their unorthodox gender in public would constitute a breach of acceptable military conduct.<sup>51</sup> While not discriminating on one level (one may *be* a woman), this fictional policy clearly discriminates on another. It both burdens women with the task of managing their public identities so that they appear to be men and prohibits women from doing what men may do,

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47. *Id.* at 249 (summarizing Commission letter to Singer).

48. *Id.* at 251.

49. *Id.* at 252.

50. *Id.* at 255.

51. Although some women would find it easier than others to conceal their gender and adopt a pseudonymously male identity (just as some gay men and lesbians find it easier than others to adopt a pseudonymous heterosexual identity), the status-conduct distinction would permit the military or any other institution that adopted such a policy to claim that it was not discriminating against persons who *are* women, but only against womanly conduct.

namely, representing themselves as having the identities that they do have.<sup>52</sup>

#### D. *The Lacuna in First Amendment Arguments*

It is tempting to argue that restrictions on public self-representation violate First Amendment rights to freedom of speech and association. The District Court took this route in *Ben-Shalom v. Secretary of the Army*.<sup>53</sup> Miriam Ben-Shalom, a member of the army reserves, was discharged on the grounds that she evidenced homosexual tendencies, desires, or interests. She had in fact acknowledged on several occasions that she was lesbian. The district court stated that the Army could not dismiss a service member for simply declaring her lesbianism because this violated soldiers' First Amendment rights "to meet with homosexuals and discuss current problems or advocate changes in status quo" and "to receive information and ideas about homosexuality."<sup>54</sup> In their critical take on *Ben-Shalom*, the editors of the Harvard Law Review argue that "regulations that penalize individuals who state that they are gay or lesbian . . . burden the right to express dissenting views on sexuality and sex roles, and, as such, contravene the First Amendment's goal of preserving a multiplicity of world views and attitudes."<sup>55</sup>

One might think that this is why the Court of Appeals for the Sixth Circuit erred in *Rowland v. Mad River Local School District*.<sup>56</sup> Marjorie Rowland, a high school counselor, disclosed her bisexuality to several fellow school employees. She was subsequently asked to resign; when she refused, she was suspended, then transferred to a position with no student contact, and then not rehired after her contract expired. Relying on the test set out in *Connick v. Myers*,<sup>57</sup> the court deemed Rowland's disclosure merely personal, not the public speech of a citizen speaking on a

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52. The example is not entirely fictional. While claiming not to discriminate against persons because they are women or black, employers may penalize employees for not exhibiting sufficiently masculine or white traits. The disanalogy between gay men and lesbians on the one hand and women and blacks on the other is perhaps best understood as one of degree.

53. 489 F. Supp. 964 (E.D. Wis. 1980).

54. *Id.* at 974.

55. EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 63 (1989).

56. 730 F.2d 444 (6th Cir. 1984).

57. The court explained:

In *Connick* the Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which

matter of public concern. It thus refused to grant First Amendment protections to her disclosure.

Both Judge Edwards, dissenting from the Sixth Circuit Court's majority opinion, and Justice Brennan, dissenting from the denial of certiorari,<sup>58</sup> took issue with this classification of Rowland's identity-statement as merely personal. The circuit court had argued that "[t]here was absolutely no evidence of any public concern in the community or at Stebbins High with the issue of bisexuality among school personnel when she began speaking to others about her own sexual preference."<sup>59</sup> Taking a larger view of the public, both Judge Edwards<sup>60</sup> and Justice Brennan<sup>61</sup> argued that public debate about the rights of homosexuals was in fact currently ongoing (even if not at Stebbins High), and thus "[t]he fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that debate."<sup>62</sup>

However tempting invoking First Amendment protections may be, there is something odd about classifying representations of one's identity as *either* public or private speech. Consider, first, the fictional gender policy. Is discharging a person for stating "I am a woman" best criticized as a violation of rights to speech, expression, and association? Is one's gender, like one's political views, simply a possible subject of speech or basis of association? Or is it instead constitutive of being a speaker? In our social world, gender is such a fundamental social category that it is the first thing people want to know about the persons with whom they interact, and "[t]he pressure on each of us to guess or determine the sex of everybody else both generates and is exhibited in a great pressure on each of us to *inform* everybody all the time of our sex."<sup>63</sup> Furthermore, in our social world the psychological process of becoming gendered is part of the process of becoming a self, a subject, an "I". In short, speakers enter into the world of speech and expression as gendered subjects. Thus gender is better viewed as a feature of being a speaker rather than simply something one might wish to express to others. To prohibit a particular gendered self-representation in the public world is,

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to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

*Id.* at 449 (quoting *Connick v. Myers*, 461 U.S. 138 (1983)).

58. *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009 (1985).

59. *Rowland*, 730 F.2d at 449.

60. *Id.* at 452-53.

61. *Rowland*, 470 U.S. at 1012.

62. *Id.*

63. FRYE, *supra* note 1, at 17, 23. Frye argues that sex-marking and sex-identification are basic to, and a condition of the intelligibility of, our interactions.

then, to do much more than restrict what a speaker may say or with whom she may associate. It is to deny that a particular subject may speak at all. Under the fictional gender policy, women may not speak. Only men, real and pseudonymous, may.

Like gender, sexuality is a fundamentally constitutive feature of our social world and of the persons who inhabit it. For better or worse, we have inherited a view of sexuality as something that, like gender, pervades the entire personality and orients persons in the social world. Persons enter the adult world of speech and expression as sexual subjects. Unlike gender, however, the pressure to know others' and make clear one's own sexuality is relieved, for heterosexuals at least, by the presumption of universal heterosexuality. That presumed heterosexuality, however, is better viewed as a presumption about what it means to be a speaker rather than a presumption about what speakers might wish to express. As in the case of gender, prohibiting a particular sexual self-representation in the public world not only restricts the content of speech, but, more importantly, denies that lesbian, gay, or bisexual subjects may speak at all. Only heterosexuals, real and pseudonymous, may.

The upshot of the decision in *Rowland* was precisely to deny that a bisexual subject may speak. Although denying that Rowland could be penalized simply for her status as a bisexual, it affirmed that it was permissible for the school to discipline her for making statements about her sexual preference.<sup>64</sup> In a social context like ours, where speakers' heterosexuality is presumed, this amounts to ruling that employers may penalize their employees for refusing to speak as (presumed) heterosexual subjects.

In short, the First Amendment protects speech, guaranteeing that some things *may be said*. It does not protect speakers, guaranteeing that some sorts of speakers *may do the saying*. When Marjorie Rowland announced "I am a bisexual," she specified who was doing the saying. However unfortunate the consequences, the court majority was right not to equate, as Judge Edwards and Justice Brennan did, her statement "I am a bisexual" with the expression of an opinion about sexuality. To secure openly gay men's and lesbians' access to the public sphere by equating self-identifying statements with expressions of opinion thus errs, first, by mistaking the question of *who* may speak for the question of *what* may be said.

Second, securing access to the public sphere under the First Amendment implies that openly gay men and lesbians have entitlement only to *politicized* publicity and only to the public sphere

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64. *Rowland*, 730 F.2d at 450.

of *political* debate. It implies, that is, that they have no claim to being mentionable—to being public—*except* under social conditions that make their mention a political, public, and debated subject. This was, in essence, both the Sixth Circuit's majority view and that of Judge Edwards and Justice Brennan. Their disagreement centered on the question of whether or not bisexuality was in fact a subject of political debate, and thus whether Rowland's self-identifying statement qualified for First Amendment protection. No one questioned the broader implications of interpreting the entitlement to publicly identify oneself as a First Amendment entitlement, and thus of protecting self-identifications *only on condition* that they occur as part of a larger public debate. But when the formally equal First Amendment entitlement of *all* persons to identify their sexuality in the public arena is put into play in a heteronormative social world, the result will be *de facto* inequality between heterosexuals' and nonheterosexuals' entitlement to utter self-identifying statements. To say that the social world is heteronormative is to say that the social world is structured on the presumption that it is both natural and normal for persons to be heterosexual. The heteronormativity of the social world guarantees that heterosexuals will have broad access, *as* heterosexuals, to all public spaces and all social life that takes place beyond the closed doors of their homes—streets, workplaces, schools, and entertainment. Thus, heterosexuals need not rely on First Amendment protections to guarantee the acceptable publicizing of heterosexual identity. They need not prove that "I am a heterosexual" is part of a public debate in order to secure their public self-identifications. In fact, the access of heterosexuals to the public sphere is not conditional, nor is the public to which they are guaranteed access limited to a sphere of political debate.

Finally, by entering the public sphere only under the aegis of free speech, openly gay, lesbian and bisexual persons enter public space as *debatable* speakers. If to proclaim one's homosexuality is itself equivalent to stating a political opinion, then that same proclamation will also necessarily and ineluctably be an invitation to having one's deviance from heterosexual norms challenged and debated by others. Once publicly proclaimed, there will be no social immunity from public scrutiny and public criticism. By contrast, the heteronormativity of public life outside the private home guarantees that heterosexual self-representation will be immunized against public scrutiny and challenge. Put simply, heterosexuals may claim that their heterosexual lives (of dating, flirting, marriage, procreating, etc.) is their private business—not open for debate—while simultane-

ously enacting those "private" lives in public space. The liberty to conduct one's "private" life in this public *nonpoliticized* space is precisely what gay men and lesbians do not have. Rowland legitimized their not having this liberty.

In sum, neither status-based anti-discrimination policies nor First Amendment protections of speech adequately guarantee gay men and lesbians that they may dare speak their names. Because public, self-identifying statements may be deemed "conduct" rather than integrally connected to status, status-based policies may simply entitle individuals to *be* lesbian or gay in public space, but not to *represent* themselves as lesbian or gay in public space. Because the First Amendment only protects speech on matters of public concern, it protects gay men's and lesbians' self-identifying statements only when they are part of a public debate about homosexual rights. Self-identifications, like Marjorie Rowland's, uttered in confidence or as part of everyday personal conversation in public space escape First Amendment protection. Thus the First Amendment entitles lesbians and gay men to enter *arguments* about their sexuality; it does not entitle them to *be* lesbian or gay *speakers* regardless of the subject of conversation.

### III. PREVENTING FUTURE GENERATIONS OF GAY AND LESBIAN PERSONS

From the first emergence of "sexual inversion" in psychiatric taxonomies of the late 1800s, the distinctions between congenital and acquired conditions, between personality type and behavior, and between cross-genderization and same-sex conduct were central to understandings of the forms that homosexuality and lesbianism could take. For turn of the century sexologists Havelock Ellis and Richard von Krafft-Ebing, both of whom played a central role in establishing and defining sexual inversion as a psychiatric condition, "true" inverts came by their homosexuality congenitally; and their distinguishing feature was not the orientation of their desire, but their cross-genderization, that is, their apparent constitution as a unique personality type—the "third sex."<sup>65</sup> True, congenital inversion was contrasted with acquired, situational inversion. Situational factors were thought to be capable of turning "true" heterosexuals into persons who, though not significantly cross-gendered, sexually desired others of the same sex. Those situational factors included childhood

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65. See HAVELOCK ELLIS, *STUDIES IN THE PSYCHOLOGY OF SEX*, VOL. II: *SEXUAL INVERSION* (1928); RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS: A MEDICO-FORENSIC STUDY* (1947).

masturbation, confinement to same-sex environments in prisons, convents, and boarding schools, participation in the women's movement, and the seductive advances of true inverts. While congenital inversion was, perhaps, incorrigible, acquired inversion was, on this view, both curable and preventable by manipulating situational factors and inculcating proper sexual habits.

The "true" versus "acquired" distinction affected and continues to affect policy concerning gay men and lesbians in this century. During World War II, for example, psychiatrists became increasingly involved in setting military policy. Motivated partly by psychiatric insistence on the difference between true homosexuality and mere homosexual conduct, and partly by the practical need to retain military personnel, the military attempted to distinguish "true" from "salvageable" homosexuals.<sup>66</sup> Current military policy continues to distinguish between true and situational homosexuals, with the burden of proof falling on those charged with homosexual conduct to demonstrate that they are "truly" heterosexuals.<sup>67</sup>

In the 1990's, the search for a gay gene continues the tradition of equating true homosexuality with a congenital condition. Arguments for gay-tolerant policies based on the claim that gay men and lesbians are "born that way" fall squarely in line with turn of the century arguments, most notably by Magnus Hirschfeld and his Scientific-Humanitarian Committee, for social acceptance of the congenital invert.<sup>68</sup> Given, however, a pervasive cultural distinction between true and situational homosexuals, such arguments are doomed from the outset to be ineffective against a broad band of social policies whose aim is not so much the differential treatment of (truly and incorrigibly) gay and lesbian persons as the prevention of new gay and lesbian persons.

In an essay ironically titled "How to Bring Your Kids up Gay," Eve Sedgwick argues that increasing tolerance of adult gay persons has gone hand in hand with the attempt to prevent new gay persons from coming into being.<sup>69</sup> She notes that in the same year that the American Psychiatric Association removed homosexuality from the roster of pathological conditions in its Diagnostic and Statistical Manual (DSM-III), it introduced the

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66. ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: A HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* 136-138 (1990).

67. 32 C.F.R. § 41, App. A, Pt.1, H.1.c(2) (1993).

68. JOHN LAURITSEN & DAVID THORSTAD, *THE EARLY HOMOSEXUAL RIGHTS MOVEMENT, 1864-1935* (1974).

69. EVE K. SEDGWICK, *How to Bring Your Kids up Gay*, in *FEAR OF A QUEER PLANET*, *supra* note 11, at 69.



new category Gender Identity Disorder of Childhood.<sup>70</sup> Boys become susceptible to this diagnosis if, in addition to expressing distress about being a boy, they display a "preoccupation with female stereotypical activities as manifested by a preference for either cross-dressing or simulating female attire, or by a compelling desire to participate in the games and pastimes of girls."<sup>71</sup> The revised edition, DSM-III-R, adds, "and rejection of male stereotypical toys, games, and activities."<sup>72</sup> Similarly, in DSM-III-R, girls become susceptible to this diagnosis if, in addition to expressing distress about being a girl, they show a "persistent marked aversion to normative feminine clothing and insistence on wearing stereotypical masculine clothing, e.g., boys' underwear and other accessories."<sup>73</sup> Harkening back to sexologists' equation of true inversion, not with same-sex desire, but with cross-genderization, this new disorder appears to be as much about the early detection and prevention of homosexuality as about control of gender deviance. The message of DSM-III, in Sedgwick's view, is that while *existing adult* homosexuals deserve dignified treatment at the hands of psychiatric professionals, psychiatrists may (perhaps ought to) intervene in the lives of proto-gay *children* to prevent new gay persons from coming into being.<sup>74</sup>

Gay preventative measures have been framed not only as matters of gender health, but matters also of parental rights and duties. One of the psychiatrists Sedgwick critiques, for example, invokes the theory of parental dominion to justify parental intervention in proto-gay children's lives: "the rights of parents to oversee the development of children is a long-established principle. Who is to dictate that parents may not try to raise their children in a manner that maximizes the possibility of a heterosexual outcome?"<sup>75</sup> Others construe intervention as obligatory. In her article advocating gay access to surrogacy, Sharon Elizabeth Rush

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70. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980). The American Psychiatric Association de-pathologized homosexuality in 1973, although DSM-III was not published until 1980.

71. *Id.* at 266.

72. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 73 (3d rev. ed. 1987).

73. *Id.*

74. Dignified treatment of gay men and lesbians within psychiatry has not, of course, always been the norm. Efforts to "cure" gay men and lesbians reached their peak during the 1950s and 1960s. For an autobiographical account, see MARTIN DUBERMAN, CURES: A GAY MAN'S ODYSSEY (1992).

75. SEDGWICK, *supra* note 69, at 78.

moves swiftly from sanctioning adult homosexuality to condemning the creation of new gay persons:

Many heterosexual parents may be quite tolerant and accepting of homosexuality, and many homosexual parents may be quite proud to be homosexual. Nevertheless, given the social reprobation that at present attaches to being homosexual in the United States, and given the love and affection that most parents feel toward their children, I find it unbelievable that any parents—heterosexual or homosexual—would teach their children to be homosexual. Responsible and loving parents who were given a choice, in my opinion, simply would not choose to subject their child to the pain and isolation that inevitably attach to being a member of a socially disdained group.<sup>76</sup>

However legitimated—whether on grounds of psychological health, parental rights, or parental obligation—the goal of preventing kids from turning out gay underlies policy that restricts gay and lesbian parenting, employment in child care, participation in early education and child service organizations (such as the Boy Scouts of America), and the sexual content of school curricula.

One of the University of Missouri's principal reasons for refusing to recognize the student group Gay Lib was that "[w]hat happens to a latent or potential homosexual from the standpoint of his environment can cause him to become or not to become a homosexual."<sup>77</sup> In the University's and dissenting Judge Regan's view, the University had a responsibility to protect potential homosexuals from becoming overt homosexuals.<sup>78</sup> And that, in their view, meant protecting them from being influenced by their fellow (overtly) gay and lesbian students.

The goal of preventing new gay and lesbian persons also figured centrally in the court ruling on the New Hampshire adoption law that "prohibits any person who is homosexual from adopting any person, from being licensed as a member of a foster family, and from running day care centers."<sup>79</sup> In response to the New Hampshire House of Representatives' request for a judicial opinion on the constitutionality of this law (then, House Bill

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76. Sharon E. Rush, *Breaking with Tradition: Surrogacy and Gay Fathers*, in *KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY* 102, 119 (Diana Tietjens Meyers, et al. eds., 1993).

77. *Gay Lib v. University of Mo.*, 558 F.2d 848, 852 (8th Cir. 1977) (summarizing the Board of Curators of the University of Missouri's resolution).

78. *Id.* at 859.

79. H.R. 70, N.H. Regular Sess. (1987), *quoted in In re Opinion of the Justices*, 530 A.2d 21, 23 (N.H. 1987) (discussing constitutionality of the bill).

70), the New Hampshire Supreme Court ignored any criteria of fitness to parent other than capacity to raise children to be heterosexual. In its view, "the legislature can rationally act on the theory that a role model can influence the child's developing sexual identity,"<sup>80</sup> and thus can legitimately regard gay and lesbian persons as unfit for adoptive and foster parenting.

Similar worries about the possibility of creating new generations of gay and lesbian persons surface in custody cases. Gay and lesbian parents may be subjected to special visitation restrictions designed to prevent their children from exposure to gay "lifestyles"; for example, the child may not be taken to gay/lesbian gatherings or gay churches, visit overnight, or visit while a same-sex partner or other "known homosexuals" are present; and the parent may be required to end a same-sex relationship or not live with his or her partner.<sup>81</sup>

Gay prevention also appears to underlie attempts to outlaw the "promotion" of homosexuality. In 1988, Britain passed Clause 28 of the Local Government Act which stipulated that "A local authority shall not—(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality; (b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship."<sup>82</sup> In a similar vein, a 1992 Oregon ballot measure would have amended the state constitution to prohibit the use of state facilities to "promote, encourage, or facilitate homosexuality." It would also have required state agencies, especially the Department of Higher Education and the public schools, to "assist in setting a standard for Oregon's youth that recognizes homosexuality. . . as abnormal, wrong, unnatural and perverse and that these behaviors are to be discouraged and avoided."<sup>83</sup> Both "no promo homo" policies, as legal theorist Nan Hunter calls them, were antedated by the (failed) 1978 California Briggs Initiative under which any school employee could be fired for "advocating, soliciting, imposing, encouraging or promoting of private or

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80. *Id.* at 25.

81. EDITORS OF THE HARVARD LAW REVIEW, *supra* note 55, at 122-123; Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 191 n.15 (1988).

82. Jeffrey Weeks, *Pretended Family Relationships*, in *AGAINST NATURE: ESSAYS ON HISTORY, SEXUALITY, AND IDENTITY* 134, 137 (1991) (quoting Local Gov't Act, 1988, ch. 9, Sec. 28(1) (Eng.)). Weeks also provides a socio-historical analysis of why the family became a focus of British legal attention.

83. Timothy Egan, *Oregon Measure Asks State to Repress Homosexuality*, N.Y. TIMES, Aug. 16, 1992, at A34.

public homosexual activity directed at, or likely to come to the attention of schoolchildren and/or other employees."<sup>84</sup>

Heterosexual control over standards of child mental health, over blood, adoptive, and foster parenting, and over the socialization of children in public institutions facilitates the reproduction of heterosexual society. It ensures that adult gay men and lesbians will have little say in what kinds of persons future generations will be. Even if it is not possible to make proto-gay children turn out heterosexual, gay preventative socialization practices can go some way toward ensuring that the next generation of gay men and lesbians will accept as reasonable both the requirement of adopting a pseudonymous heterosexual identity as a condition of access to the public sphere and their exclusion from any socially legitimated, "nonpretended" private sphere of marriage, parenting, and the family. Public commitment to gay prevention also legitimates the continued punitive expulsion of older gay and lesbian children from their own families and the termination of the emotional and material support that families provide for children.

It is tempting to respond to these various gay preventative strategies by arguing that pathologizing gender deviance in childhood makes little sense in a psychiatric scheme that depathologizes homosexuality; that in point of fact the children of gay men and lesbians are just as likely to grow up heterosexual as are the children of heterosexuals; and that "no promo homo" policies involve censorship and the legal underwriting of one set of moral values. Though having a place, such arguments miss the deeper issue. That deeper issue concerns whether heterosexuals as a social group are entitled to claim for themselves exclusive entitlement to determine the character of future generations.

#### IV. CONSTRUCTING GAY AND LESBIAN PERSONS AS UNNATURAL CRIMINALS

The moral prohibition on sodomy, understood as a crime against nature and sin against God, dates from the Middle Ages when it was part of a more general prohibition on nonreproductive sexual acts.<sup>85</sup> The prohibition on sodomy did not presuppose a special sort of actor (the homosexual), nor was sexual

84. Cal. Proposition 6, § 3(b)(2) (1978), *quoted in* Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1703 (1993). Hunter gives a detailed account of the full range of no promo homo policies.

85. John Boswell, *Categories, Experience and Sexuality*, in *FORMS OF DESIRE*, *supra* note 5, at 157-158.

object choice the determinant of who was a sinner.<sup>86</sup> The social construction in the late 1800's of a special sort of sexual actor—the homosexual—is by now well documented.<sup>87</sup> With the emergence of the homosexual person as a personality type, sodomy shifts from being simply a forbidden act, like abortion or adultery, to being one among many indicators of an underlying psycho-sexual personality structure. Although much has been made of the conceptual shift from sodomitical act to homosexual person, less has been made of the resulting normative shift from locating criminality and immorality in the act itself to locating them in the person whose essential nature it (supposedly) is to engage, among other things, in sodomy. The invention of the homosexual—the pervert, the degenerate, the sexual psychopath—opened the doors for the invention of the person for whom moral depravity and criminality were constitutive of his or her nature. Criminality and immorality come to reside less in *what* one does than *who* one is. Distinctions between predator and prey, the corrupt and the corrupted, the (homo)sexual “addict” and the heterosexual performer of homosexual acts come to mediate normative judgments about same-sex sexual conduct.

In *Morrison v. State Board of Education*,<sup>88</sup> judicial discussion of Morrison's same-sex activity was mediated by assumptions about who Morrison was. When Marc Morrison's week-long sexual relationship with a fellow teacher, Fred Schneringer, came to light, the California State Board of Education charged Morrison with immoral and unprofessional conduct, and revoked his licenses to teach secondary school and exceptional children. The court argued that the Board's interpretation of “immoral conduct” was overly broad, unconnected to considerations of employees' fitness to teach, and threatened “arbitrarily [to] impair the right of the individual to live his private life, apart from his job, as he deems fit.”<sup>89</sup> Moreover, there was no evidence that Morrison had sought improper relations with students, had failed to convey to them correct principles of morality, or that his relationship with co-workers had been affected by the incident; in short, there was no evidence of his unfitness to teach.<sup>90</sup> However, the particular

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86. *Id.* at 159.

87. See, e.g., FORMS OF DESIRE, *supra* note 5. Michel Foucault has perhaps become most well known for articulating the thesis that the homosexual is a social construction. See 1 MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY (1990).

88. 461 P.2d 375 (Cal. 1969)(en banc).

89. *Id.* at 394.

90. *Id.* at 392.

facts that the court chose to highlight in *Morrison* do not support this line of reasoning. Instead those facts suggest that Morrison was not really a homosexual, even if he had engaged in same-sex sex. The court repeatedly stressed the "limited" nature of Morrison's homosexual relationship and observed that Morrison and Schneringer were suffering severe emotional stress at the time, that Morrison had suggested women whom Schneringer might date, that with the exception of the Schneringer incident Morrison had not had any "homosexual urges" in a dozen years, and that there was no evidence of "abnormal activities or desires" since that incident.<sup>91</sup> Here the court seems less interested in ascertaining whether Morrison's private conduct affected his public work performance than in ascertaining *who* Morrison really is. Is he really a homosexual, that is, a morally suspect kind of person, whose fitness to teach might reasonably be doubted? Or is he more innocently just a heterosexual performer of homosexual acts?

The image of gay men and lesbians as morally depraved and prone to criminal conduct fully flowered in the McCarthy era's programs to purge the military and civil service of all "sexual perverts." Gay men and lesbians were, by their very nature, a threat to national security, an inherently subversive element in society, and "generally unsuitable" for government employment.<sup>92</sup> They were declared to be so by an executive order, which ordered their dismissal from all branches of government service.<sup>93</sup> Evidence, however thin, of mere homosexual *tendencies*, even in the complete absence of evidence of actual sexual activity, was sufficient grounds for dismissal.<sup>94</sup> And in 1952, Congress officially closed the national borders to immigrants with "psychopathic personalities," i.e., gay men and lesbians.<sup>95</sup>

This equation, consolidated in the 1950s, of homosexuality and lesbianism with criminality and immorality produces both an equation of *being* gay or lesbian with committing criminal or immoral *acts* as well as a concomitant presumption that whatever it is that heterosexuals are *doing* (even if that remains unexam-

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91. *Id.* at 377-78.

92. SENATE SUBCOMM. ON INVESTIGATIONS, COMM. ON EXPENDITURES IN THE EXEC. DEP'TS, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT, S. DOC. NO. 241, 81st Cong., 2d Sess. 3 (1950).

93. 18 Fed. Reg. 2489 (1953).

94. LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA* 142-44 (1991).

95. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a), 66 Stat. 163, 182 (1952). For an historical account of the McCarthy era purge of homosexuals, see BÉRUBÉ, *supra* note 66.

ined and unarticulated) must be criminally and morally innocent.

Judges, employers, university administrations, and others often infer from the fact that a person is gay or lesbian that they have engaged in sodomy and thus that they have engaged in criminal (or criminalizable) activities. In *Shahar v. Bowers*,<sup>96</sup> for example, the Attorney General of Georgia, Michael Bowers, withdrew his employment offer when Robin Shahar announced her marriage to a woman. Bowers equated lesbian marriage with violation of the anti-sodomy statute that his office was committed to upholding. Newspaper publishers have refused to publish ads for gay and lesbian counseling and legal aid on the grounds that they do not want to be associated with illegal (read: sodomitical) activity.<sup>97</sup> Adoption agencies have refused to permit nonheterosexuals to adopt on the grounds that children should not be placed with parents who violate the law.<sup>98</sup> Although almost uniformly unsuccessful in court, university administrators, like those of the University of Missouri, have refused to recognize lesbian and gay student organizations on the grounds such groups would increase the incidence of criminal acts of sodomy.<sup>99</sup> Attempts to secure suspect or quasi-suspect class status for gay men and lesbians, and with it heightened scrutiny tests, have been rejected on the grounds that sodomy is still criminalized in slightly under half the states and that laws criminalizing sodomy are not unconstitutional.<sup>100</sup> The equation of being gay or lesbian with committing sodomy and thus being a criminal also underlies the military policy of excluding persons simply on the basis of evidence of their homosexual *orientation*.<sup>101</sup>

Equating homosexuality with sodomy ignores the facts that gay and lesbian sexual practices cover a broad spectrum, sodomy

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96. 58 Fair Empl. Prac. Cas. (BNA) 668 (N.D. Ga. Mar. 9, 1992).

97. Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976)(en banc).

98. Appeal in Pima City Juvenile Action B-10489, 727 P.2d 830 (Ariz. Ct. App. 1986), cited in EDITORS OF THE HARVARD LAW REVIEW, *supra* note 55, at 11 n.10.

99. Gay Lib v. University of Mo., 558 F.2d 848 (8th Cir. 1977).

100. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh 881 F.2d 454, 464 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

101. As Judge Norris caustically observed in *Watkins*, "The Army equates homosexuals with sodomists and justifies its regulations as simply reflecting a rational bias against a class of persons who engage in criminal acts of sodomy. In essence, the Army argues that homosexuals, like burglars, cannot form a suspect class because they are criminals." *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989)(en banc) (Norris, J., concurring).

being only one possibility; that one may self-identify as gay or lesbian (just as one may self-identify as heterosexual) without having sex at all; and that oral and anal sex are hardly unique to lesbians and gay men. The equation of homosexuality and lesbianism with sodomy, however, makes a peculiar kind of sense if one begins from the assumption that "homosexuality" and "lesbianism" designate crime-prone personalities. Since what gay men and lesbians do (sexually or otherwise) is generally not criminalized, the notion of homosexuality-as-criminality can only be articulated by equating homosexuality with whatever acts happen to be criminalized.<sup>102</sup>

The normative status of the identities "gay" and "lesbian" thus *precedes* and infects the normative status of their acts, rather than as one might suppose, the reverse. What makes same-sex touching, kissing, hand holding, knee-squeezing, cohabitation, and marriage wrong is neither so much their same-sexedness nor their likely eventuation in sodomy. Rather, it is their being done by a kind of person, that is, their being *homosexual* or *lesbian* acts. This is perhaps nowhere more clearly evident than in the military policy itself. Army Regulations exempt from automatic discharge soldiers who have engaged in same-sex sex but who can prove that same-sex sexuality was a departure from customary behavior, is unlikely to recur, and is undesired.<sup>103</sup> As Judge Norris so nicely summarized Army policy in *Watkins v. United States Army*,

If a straight soldier and a gay soldier of the same sex engage in homosexual acts because they are drunk, immature or curious, the straight soldier may remain in the Army while the gay soldier is automatically terminated. In short, the regulations do not penalize soldiers for engaging in [same-sex] acts; they penalize soldiers who have engaged in [same-sex] acts only when the Army decides that those soldiers are actually gay.<sup>104</sup>

The distinction between an act of same-sex sex (which can be done by either heterosexuals or nonheterosexuals) and a specifically *homosexual* act (which can only be done by homosexuals) is here out in the open. It is also out in the open in New Hampshire's statute against gay and lesbian adoption, which distin-

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102. Homosexuality-as-crime can be articulated by equating homosexuality not only with sodomy but with child molestation. Custody, visitation, adoption, and foster parenting decisions may appeal to this latter equation.

103. See *supra* note 37.

104. 875 F.2d 699, 715 (9th Cir. 1989) (Norris, J., concurring) (footnote omitted). For clarity, I have substituted "same-sex" for "homosexual" in the original text.



guishes between "true" homosexuals and those who have engaged in same-sex sex but can claim a heterosexual identity.<sup>105</sup> The distinction between same-sex act and distinctively homosexual act operated more covertly in *Hardwick*. In Justice White's view, "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon *homosexuals* to engage in sodomy."<sup>106</sup> This framing of the question not only ignores the facially neutral character of Georgia's sodomy statute; more importantly, it ignores the fact that George's statute concerns acts, not identities. That statute prohibits same-sex sodomy regardless of whether the doer is homosexual or heterosexual. Having shifted the focus from acts to identities, Justice White concludes that *homosexuals* have no right to engage in sodomy, leaving open the possibility that *heterosexuals* do (regardless of the sex of their partner in sodomy).<sup>107</sup>

The combined effect of equating homosexuality with criminality but *only* statutorily forbidding sodomy is the production a novel civic status: the citizen-criminal. Almost everything that gay men and lesbians might consider constitutive of or connected to their being gay or lesbian is legal: nonsodomitical sex practices, kissing, holding hands, membership in gay organizations, going to gay bars, holding a marriage ceremony, providing AIDS and safe sex education, publishing books about being lesbian or gay, lobbying for AIDS research funding and against anti-gay initiatives, and so on. Given the legality not just of *being* gay (viewed as some inner "tendency") but also of conducting one's life as a lesbian or gay man, anyone who is gay or lesbian might naturally conclude that they have the same citizenship status that any heterosexual has. However, because all things gay or lesbian are routinely coupled, in legal and lay imaginations, with sodomy (or child abuse, or solicitation, or some other category of illegality), nothing one does *as* a gay man or lesbian is untainted by the specter of criminality. Everything one does becomes an act of promoting criminality or immorality. And every gay-positive statement metamorphoses into an endorsement of crime or immorality.

Constructed as citizen-criminals, gay men and lesbians occupy a shadowy territory neither fully outside nor fully inside civil society. Unlike the criminally insane, whose inability to tell right from wrong disqualifies them from civic status, gay men and lesbians formally possess civic status. But unlike heterosex-

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105. *In re Opinion of the Justices*, 530 A.2d 21, 24 (N.H. 1987).

106. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (emphasis added).

107. See Halley, *supra* note 28, at 1746-47.

ual citizens, whose relation to crime is presumed to be merely contingent (they might or might not violate the law), gay men and lesbians are presumed to be inherently implicated in criminal activity. Constituted as undesirable citizen-criminals, gay men and lesbians contribute to production and reproduction and fulfill their civic duties as "reverse malingerers"—persons who falsify their status not in order to escape from civic burdens but in order to accept them.<sup>108</sup>

This citizen-criminal status gives discriminatory policies against gay men and lesbians a distinctive flavor. While racial and gender discrimination are largely predicated on *inferiorizing* stereotypes, sexuality discrimination is largely predicated on *criminalizing* stereotypes whose ultimate suggestion is not that gay men and lesbians are *incompetent*, but that they are *untrustworthy* members of civil society. Socially constituted as beings whose very nature it is to commit crimes against nature, God, and state, gay men and lesbians, insofar as they publicly claim those identities, speak under a pall of guilt. Unlike their presumed "innocent" and civic-minded heterosexual counterparts, they cannot represent themselves as gay men or lesbians without undermining their standing in the public sphere. That includes their standing to challenge conventional moral and legal norms. Heterosexuals have, for example, been extremely successful in decriminalizing heterosexual "crimes against nature"—use of birth control, abortion, adultery, heterosexual sodomy. They have also been reasonably successful in pluralizing acceptable family arrangements—divorce, single-parenting, egalitarian gender arrangements, separate husband and wife domiciles. As presumed trustworthy members of civil society, heterosexuals have the standing to claim that they simply have different moral opinions about the permissibility of "alternative" sexual and familial practices and to request that law and social practices recognize differences of opinion. As presumed untrustworthy members, lesbians' and gay men's expression of different, disagreeing moral opinions is continuously vulnerable to being reconstituted as promotion of immorality, if not also criminality. So, for instance, Michael Bowers reconstituted Robin Shahr's disagreeing moral opinion about what makes a relationship a marriage as a promotion of illegal sodomy.

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108. "Reverse malingerer" was the military's inventive label during World War II for gay men and lesbians who presented themselves as heterosexuals in order to do military service. See BÉRUBÉ, *supra* note 66, at 20. The military may discharge servicemen not only for being homosexual but also for "fraudulent enlistment" if they did not originally declare their homosexuality.

## CONCLUSION

Sexuality injustice is not best understood as a matter of confining persons who are gay or lesbian to subordinate, disadvantageous, exploitable places within sexuality-structured public and private hierarchies. Thus, specific measures such as extending privacy rights and anti-discrimination protection to gay men and lesbians should not be seen as primarily aimed at remedying systematic inequities in their material condition and access to opportunities.

Instead, sexuality injustice is better understood as a matter of displacing gay and lesbian identities to the "outside" of civil society, and thus denying a place for gay and lesbian identities within both public and private spheres. First, gay and lesbian identities are displaced from workplaces, streets, the military, markets, schools, and other public spaces by requiring gay men and lesbians to adopt pseudonymous heterosexual identities as a condition of access to those public spaces. Displacing gay and lesbian identities from the public sphere in this way amounts to reserving the public sphere for heterosexuals only. Second, gay and lesbian identities are displaced from our social future through legal, educational, psychiatric, and familial practices that are aimed at insuring the heterosexuality of future generations. The institutionalization of gay preventative and heterosexual productive measures amounts to reserving for heterosexuals only exclusive entitlement to determine the character of future generations. Finally, the displacement of gay and lesbian identities from civil society is legitimized by equating those identities with criminality, immorality, and untrustworthiness as a citizen. Defined as citizen-criminals, gay men and lesbians are denied equal standing to participate in legal, social, and moral debates, including, most importantly, debates over the place of gay and lesbian identity in the public and private spheres.